IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1418

WILLIAM E. BLOOMER, JR.,

Petitioner,

—against—

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented for Review

Respondent concurs with the question for review as presented in petitioner's brief.

Reasons for Refusing the Writ

While there is conflict between the Circuit Courts of Appeals on this issue the decision below was correct and there is no reason for this Court to further review it. Moreover, the issue is of insufficient importance to warrant a grant of certiorari.

ARGUMENTS

POINT I

While a conflict exists between Circuit Courts of Appeals the decision below was correct and no further review of it is warranted.

As pointed out both by petitioner herein and the Court below there is a conflict between the Circuit Courts of Appeals on the issue here presented (Petition pages 9, 12A-13A).

Respondent submits that the Court below correctly determined this case. It acted to effectuate the obvious intent of Congress in passing the 1972 amendments to the Longshoremen's & Harbor Workers Compensation Act (hereinafter LHWCA) 33 U.S.C. 901 et seq. In denying petitioner's request for proportionate sharing of the attorney's fee between himself and the stevedore-employer the Court below correctly interpreted Congressional intent. In its opinion the Court below found persuasive the reasoning of the First Circuit in *Cella* v. *Partenreederei MS Ravenna,* 529 F. 2d 15 (1975) cert. denied, 425 U.S. 975, 96 S.Ct. 2175 (1976). In the aforementioned case the Court said at page 20:

> "The 1972 amendments described above were enacted as a compromise between shipowners and stevedore-employers in order to provide increased statutory compensation payments. For years the scale of compensation payments had been insufficient. Elimination of the unseaworthiness cause of action against the shipowner, and the indemnity action against the stevedore was necessary to insure adequate funds for the increased benefits. In particular the drain on the employer's resources by the attorneys' fees and expenses required to litigate the third party actions was cited as an obstacle to funding adequate compensation payments. . . . we conclude that the overriding purpose of the 1972 amendments was to strictly limit the liability of the stevedore in order to husband its resources, and its insurance carrier's resources, for the payment of the increased benefits under the Act."

The Court concluded that requiring the employer to contribute toward the attorney's fee thereby reduced the funds available to it to meet its obligation toward injured workmen. The insurance carrier for the employer was not required to pay attorneys fees out of the portion of the recovery it received.

Neither *Swift* v. *Bolten,* 517 F. 2d 368 (4th Cir. 1975), nor *Mitchell* v. *Scheepvaart Mattschappij Trans-Ocean,* 579 F. 2d 1274 (5th Cir. 1978), devote much attention to examination of the legislative intent. In *Mitchell* where the Court does devote some attention in its decision to the intent, there is some reasoning which is questionable. The *Mitchell* Court finds fault with the reasoning in *Cella* saying at page 1280: "First, the surest means of preserving workmen's compensation funds is the encouragement of proper third party suits based on negligence." There is no factual basis for such statement and it is purely ad hoc reasoning. Common sense and experience

indicate that the great majority of longshoremen's injury cases do not present opportunities for third party recovery based on negligence or any other theory. The surest means for preserving compensation funds is what Congress directed itself to in 1972, namely reduction of the stevedore-employer's liability to double recoveries.

The Court also reasons at page 1280: "A policy of assuring just compensation for attorneys who represent plaintiffs in such actions should serve as an important safeguard for the eventual reimbursement of compensation payments made to a longshoreman injured through a third party's negligence." Again, the Court's reasoning is defective: In these cases the attorney's fee is a percentage of the recovery. His fee is the same whether or not the stevedore pays a proportionate share. The only question in these cases is whether or not the injured employee will receive a greater net recovery because the employer is paying part of the cost of his attorney.

Research into the legislative history of the 1972 amendments reveals that both the Court below and the Court in *Cella* correctly interpreted the legislative intent. In H. Rep. No. 92-1441, 92d Cong., 2d Session, found in 3 U.S. Code Cong. and Admin. News, 4698, 4702-4703 it is said: "The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in a non-maritime employment ashore insofar as bringing a third party damage action is concerned and not to endow him with any special maritime theory of liability or cause of action . . ." It is clear from the foregoing that Congress sought to divorce longshoremen from the long protected special category of seamen who were subject to higher risks in their work. They were to be allowed to bring third party suits just as non-maritime workers, but were to receive higher levels of compensation in recognition of the high hazards of their

employment and in recognition of the reduced vulnerability of their employers to double payments by virtue of the amendments to the LHWCA. There is no hint of Congress' intent to give longshoremen an extra benefit in reducing the cost to them of third party recoveries by forcing their employers to share in the attorneys' fees therefore. The fact that Congress did not provide for such does not permit the Courts to read into the act an intention to do so.

At page 4706 in a section of the report entitled "Legal Fees" there is an explanation as to the intent of the Act concerning attorneys fees to be awarded against employers in formal compensation proceedings. It is provided that: "Attorneys' fees may only be awarded against the employer where the claimant succeeds, and the fees awarded are to be based on the amount by which the compensation payable is increased as a result of litigation. Attorneys' fees may not be assessed against employers (or carriers) in other cases." Here the intent to free the employer from the burden of excessive legal costs is clear. This burden is imposed only where the compensation payable is increased and is based only upon that increase. The limited extent to which Congress authorized the imposition of attorneys' fees indicates an intent to protect the employer from the imposition of such fees. If Congress had sought to impose a proportionate share of legal fees on the employer who recovers a lien it would have spelled such out in the Act.

Therefore, it is clear that the decision of the Court below which followed the *Cella* case was correct. There is no need for this Court to review it.

POINT II

Despite the fact that there is a conflict present between the Circuit Courts of Appeal the matter is not of sufficient significance to warrant this Court's review.

The number of third party actions brought by injured longshoremen has dropped dramatically since the 1972 amendments to the LHWCA. Thus, the number of longshoremen's third party actions probably has also dropped. The issue of apportionment of the attorney's fee against the lien recovery of the employer has much less economic importance than before 1972.

Moreover; this Court denied certiorari in the *Cella* case (425 U.S. 975, 96 S.Ct. 2175, 48 L. Ed. 2d 799 (1976). At the time of this denial the conflict with the Fourth Circuit case of *Swift* was already apparent, that case having been decided in 1975. Since the issue of apportionment of attorney's fees against the lien recovery was the only one with which *Cella* was concerned it must have been the subject of the petition for certiorari. If this Court felt that the conflict between the circuits at that time was not of sufficient importance to warrant a grant of certiorari the mere fact of the Second Circuit deciding to follow the path of *Cella* in the case at bar makes no stronger case for a present grant of certiorari.

Respectfully submitted,

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